In the

United States

Court of Appeals

For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

STEWART L. UDALL, Secretary of the Interior, *et al.*, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

In outline form the State of Washington's case in the district court is this:

1. By letter of August 5, 1966 (R. 26), the Columbia Basin Project Manager ruled that state school lands within the Columbia Basin Project were subject to the 160 acre limitation of 43 U.S.C. § 423e.[1] Since the statute refers to "irrigable land held in *private* ownership,"[2] the state sought judicial

[1] App. C, *Brief for the Appellant* 47-49.
[2] *Id.* at 48.

review of the administrative decision under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706, and the mandamus statute, 28 U.S.C. § 1361. The defendants for the purpose of this review are the Manager of the Columbia Basin Project and his superiors.

2. If judicial review of the administrative action is not available the state seeks money damages from the United States under the Tucker Act, 28 U.S.C. § 1346(a)(2), for damages to Farm Unit 35.

The state's prayer for a declaratory judgment pertaining to its rights under the 1951 contract (R.17-25) between the United States and the state was abandoned in the trial court and thus is not an issue on appeal.[3] Furthermore, the state's alternate claim for monetary damages under the Tucker Act arises under 43 U.S.C. § 423e and not under the 1951 contract.

The fundamental issue in the state's case, whether relief be judicial review of administrative action or an award of damages, is the meaning of the phrase "lands in private ownership"—not whether the district court should review the 1951 contract or award damages for its breach. If the acreage limitation of the federal reclamation law does not apply to city-owned land, and it does not, *El Paso County Water Improvement Dist. v. City of El Paso*, 133 F. Supp. 894, 920 (W.D. Tex. 1955), *mod. on other grounds*, 243 F.2d 927 (5th Cir.),

[3]See *Brief for the Appellant* 15 n.21.

cert. den., 355 U.S. 820 (1957), certainly the limitation does not apply to state school lands. These lands were granted by Congress *in trust* to implement a long-standing federal policy of support for common schools. *Lassen v. Arizona Highway Dep't*, 385 U.S. 458 (1967).

REPLY TO APPELLEES' ARGUMENT

Jurisdiction Under the Administrative Procedure Act

I

The government in this case makes no arguments that were not made by it[4] and rejected by this court in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *reh. denied*, 379 F.2d 555 (1967), *cert. granted on other issues*, 389 U.S. 970 (1968). Almost without exception the decisions in this circuit uphold the district court's jurisdiction to review administrative action under the Administrative Procedure Act even though the administrative action involves property of the United States.

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[4]There was no challenge to the venue in the court below by reason of the joinder of the defendant officers of the United States in a judicial district other than that of their official residence, nor could there be. Under 28 U.S.C. § 1391(e) civil actions against officers of the United States may be brought in the judicial district (1) where the officer resides, (2) where the cause of action arose, or (3) where the real property involved in the action is situated. The government's present suggestion of improper venue, *Brief for the United States* 19-22, merits no extended discussion even if it had been timely raised.

To the long list of cases already cited in our *Brief for the Appellant* 20-27, we can add *Linn Land Co. v. Udall*, 255 F. Supp. 382 (D. Ore. 1966), *aff'd*, 385 F.2d 91 (9th Cir. 1967); *Nicholas v. Secretary of the Dep't of Interior*, 385 F.2d 177 (9th Cir. 1967); *Henault Mining Co. v. Udall*, 271 F. Supp. 474 (D. Mont. 1967); *Henrickson v. Udall*, 229 F. Supp. 510 (N.D. Calif. 1964), *aff'd*, 350 F.2d 949 (9th Cir. 1965).

Linn Land Co. involved a selection of public lands in satisfaction of certain scrip rights. *Nicholas* involved an entryman's final proof on a homestead entry. *Henault Mining Co.* was a mining claimant's successful suit for a reversal of the Secretary of Interior's decision that mining claims were invalidated for lack of discovery. *Henrickson* concerned an application for a patent of government land under a mining claim.

Since the Supreme Court's approval of *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959), in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 n.7 (1963), there can be no question but that the jurisdiction granted district courts under the Administrative Procedure Act is not limited by the fact that the administrative action being reviewed involved property of the United States.[5] The holding of the Court is fully warranted by the legislative history of the act. *Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong.,

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[5]See our *Brief for the Appellant* 21.

2d Sess. (1946) (hereafter cited as *APA Legislative History*).[6]

II

If the state's suit were one based on the 1951 contract between it and the United States—rather than one arising under 43 U.S.C. § 423e—the Administrative Procedure Act should not be construed as a grant of jurisdiction to district courts to give money damages in excess of their Tucker Act jurisdiction, *Aktiebolaget Bofors v. United States*, 194 F.2d 145 (D.C. Cir. 1951), or to give specific relief where money damages under the Tucker Act constitute an adequate remedy at law, *White v. Administrator of Gen. Servs. Administration*, 343 F.2d 444 (9th Cir. 1965); *cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Likewise, if the state's case were a quasi-contractual claim for relief against an alleged appropriation of property to governmental use, the Administrative Procedure

[6]In our *Brief for the Appellant* 27 we cited a decision from the Tenth Circuit fully supporting this court's views as to the scope of a district court's jurisdiction under the Administrative Procedure Act. We now have the citation to the reported decision: *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967). Our quotation is taken from page 805 of the reported decision.

Earlier the Tenth Circuit had approved a district court's jurisdiction in an action to compel the Secretary of Interior and his subordinates to recognize the state's title to the fee underlying the Union Pacific's federal right-of-way grant through a school section. *Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967). The district court had taken jurisdiction under the Administrative Procedure Act. 255 F. Supp. 481 (D. Wyo. 1966). The court of appeals affirmed the district court's jurisdiction, but on the basis of the mandamus statute, 28 U.S.C. § 1361.

Act will not be construed to expand a district court's Tucker Act jurisdiction to award relief other than damages. *E.g.*, *Dugan v. Rank*, 372 U.S. 609 (1963); *Fresno v. California*, 372 U.S. 627 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962). Legislative history of the Administrative Procedure Act gives some support to the view that money damages in such cases were deemed an adequate remedy at law, making the provisions of the act inapplicable by its own terms. See, *e.g.*, *APA Legislative History* 36.

It goes without saying, as this court recognized in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *reh. denied*, 379 F.2d 555 (1967), that officers of the United States must be named as defendants in a suit such as the state's instant action. A proper action under the Administrative Procedure Act against federal officers will fail where they are not joined as defendants and, instead, only the United States is sued. *E.g.*, *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964). Finally, it also goes without saying that the state could not maintain this present suit if there were a statute expressly withdrawing judicial review of the administrative action to which complaint is directed. This principle is illustrated by the cases construing 38 U.S.C. § 11a-2, prohibiting judicial review of a denial of benefits under the Servicemen's Indemnity Act of 1951, *e.g.*, *Cyrus v. United States*, 226 F.2d 416 (1st Cir. 1955); *United States v. Houston*, 216

F.2d 440 (6th Cir. 1954); *Brewer v. United States*, 117 F. Supp. 842 (E.D. Tenn. 1954).

Jurisdiction Under the Mandamus Statute, 28 U.S.C. § 1361

I

The legislative history of the mandamus statute, 28 U.S.C. § 1361, establishes beyond all doubt the jurisdiction of all federal district courts to review and compel official action on an equality with the federal district court in the District of Columbia.[7] Consequently, as pointed out by Messrs. Byse and Fiocca in *Mandamus and Venue Act*, note 7 *supra*, at 318:

> The initial resort of a federal judge reviewing official action under section 1361, therefore, should be to the body of precedents built up in the District Court and the United States Court of Appeals for the District of Columbia. Looking to those opinions he will find that those courts are in many cases categorizing actions that request affirmative relief not as 'mandamus' cases but as 'reinstatement' cases, 'land patent' cases and so on, classifications that focus on the substantive issues involved rather than the writ. *Most importantly, these District of Columbia courts have for the most part avoided reliance on the much criticized ministerial-discretionary distinction.* (Emphasis ours.)

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[7]See, C. Byse & J. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962*, 81 Harv. L. Rev. 308, 313-18 (1967) (hereafter cited as Byse & Fiocca, *Mandamus and Venue Act*).

On this basis these commentators conclude, *ibid.*:

> Since section 1361 was proposed and enacted against the background of mandamus relief as it existed in the District of Columbia in the year 1962, it would be most unfortunate if federal courts were to regard the words 'in the nature of mandamus' as an invitation to revive the artificialities of common law mandamus.

It is true, as the government here points out,[8] that the Department of Justice initially proposed that the statute be specifically limited to "ministerial duties owed the plaintiff."[9] However, before final passage of the measure such special limitation was deleted and the Justice Department acquiesced in the deletion.[10] Byse & Fiocca, *Mandamus and Venue Act*, at 317.

II

Scope of judicial review in a District of Columbia "action in the nature of mandamus" does not turn on a ministerial-discretionary distinction. See, *e.g.*, *Udall v. Tallman*, 380 U.S. 1 (1965). Jurisdiction is much broader based than that. *Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967), illustrates this point in a context that has particular application to this action.

In the *Wyoming* case, controversy had arisen over the ownership of oil and gas deposits underlying

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[8] *Brief for the United States* 26.

[9] Letter of the Deputy Attorney General, Feb. 28, 1962, S. Rep. No. 1922, 87th Cong., 2d Sess. (1962) (*U.S. Code Cong. & Ad. News*, at 2788).

[10] Letter of the Deputy Attorney General, Sept. 18, 1962, 108 Cong. Record 20079.

a railroad right-of-way across a school section in Wyoming. The United States in 1877 and in 1844 made the railroad grant to the predecessor of the Union Pacific Railroad Company. Later, under the Wyoming Enabling Act, title to a school section crossed by the right-of-way vested in the state. When the Secretary of the Interior upheld the claim of the United States to the land under the right-of-way the state and its lessee brought a mandamus action under section 1361 to compel recognition of Wyoming's title.

In view of the considerations pointed out in our *Brief for Appellant* 27-29, there can be no doubt that the Tenth Circuit decision was a proper one (even apart from the jurisdiction under the Administrative Procedure Act relied upon by the district court, 255 F. Supp. 481 (D. Wyo. 1966)).

Of course the mandamus statute is not to be construed so as to give district courts general jurisdiction to make monetary awards that would be beyond the jurisdiction of district courts in the District of Columbia, *Rose v. McNamara*, 225 F. Supp. 891 (E.D. Pa. 1964), or to change the rule already applicable to Administrative Procedure Act cases that money damages is the sole recourse of a plaintiff injured by the government's breach of its contract, *White v. Administrator of Gen. Servs. Administration*, 343 F.2d 444 (9th Cir. 1965), or to expand the scope of judicial review in those cases where it already existed, as in civil service reinstate-

ment cases,[11] *McEachern v. United States*, 212 F. Supp. 706 (W.D.S.C. 1963).

Damages Under the Tucker Act

The government correctly points out that the only Tucker Act issue before the court is whether the state has split its cause of action. The question, consequently, is whether the authorities cited by the state to show the existence of *separate* causes of action, *Brief for the Appellant* 31-35—rather than a splitting of *one* cause of action—should be distinguished.

The government has made no attempt to distinguish the cases; we see no reasonable grounds for doing so. Clearly, therefore, the state cannot be charged with splitting its cause of action for damages to Farm Unit 35.

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[11] *E.g., Mancilla v. United States*, 382 F.2d 269 (9th Cir. 1967). See, generally, M. Eisenberg, *The Influence of the Writ of Mandamus in Federal Personnel Litigation*, 45 Geo. L. J. 388 (1957); C. Murphy, *Judicial Review of the Removal of Federal Employees: A Reexamination*, 22 Fed. B. J. 25 (1962); Note, *Review of Removal of Federal Civil Service Employees*, 52 Colum. L. Rev. 787 (1952); Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 Colum. L. Rev. 719 (1966).

CONCLUSION

For the foregoing reasons and for the reasons set out in the *Brief for the Appellant*, the district court's order dismissing the state's complaint should be reversed and the cause remanded with the direction that the state's claim be heard and decided on the merits.

Respectfully submitted,

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March 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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